

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG BRYANT,

Defendant-Appellant.

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UNPUBLISHED

June 20, 2006

No. 261153

Wayne Circuit Court

LC No. 04-010487-01

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant appeals these convictions as of right. We affirm.

Defendant first argues that he was denied a fair trial because the prosecution appealed to the jury's sympathy during her opening statement and vouched for the credibility of the victim during closing argument. Because defendant failed to object to the prosecutor's allegedly improper statements at trial, we review these claims of prosecutorial misconduct for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Thus, to obtain relief defendant must show that there was a plain error that affected his substantial rights, i.e., an obvious error that was outcome determinative. *Carines, supra* at 763.

In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context to determine if the defendant received a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A prosecutor may argue the evidence and all reasonable inferences arising from it as they relate to the case, and is not required when doing so to use the "blandest" possible terms. *Bahoda, supra* at 282; *Aldrich, supra* at 112. However, a prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Further, it is improper for a prosecutor to "vouch for the credibility of [her] witness to the effect that [s]he has some special knowledge that the witness is testifying truthfully." *Bahoda, supra* at 276. A prosecutor may, however, argue that a witness is credible on the basis of the facts. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Defendant argues that the prosecution's opening statement improperly appealed to the jury's sympathy by referring to the victim as a "scared nine-year-old" for whom it would not be easy to reveal her "dirty secret" to a courtroom full of strangers. However, we find no impropriety in these comments regarding the victim and her expected testimony. Although the challenged remarks refer to a "scared" child and her potential difficulty in describing what defendant did to her, taken in context, these remarks merely provided an overview of what the prosecution expected the evidence would show and what circumstances the jury would need to take into account in evaluating the credibility of a material witness. In light of the fact that it is appropriate for the prosecution to state in its opening statement the facts it believes will be proven at trial, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and considering that it is the jury's role to determine credibility issues, *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998), the prosecution's remarks were not improper. To the contrary, when placed in the context, it is clear that the prosecution's comments were made not to elicit sympathy for the victim, but to emphasize factors that the jury could use in determining credibility – a proper form of statement from a prosecutor. *Thomas, supra*.

Regarding closing argument, defendant cites the following remarks from the prosecutor's closing argument as improper vouching for the victim's credibility:

Did the witness have any special reason to tell the truth or any special reason to lie? Most important here, was there a motive? And I submit to you, ladies and gentlemen, there was absolutely no reason whatsoever presented to you that [the victim] had any reason to lie about [d]efendant.

In fact, she had every reason in the world not to. In fact, she loved this man. She still loves him. She had no reason whatsoever. No reason.

On their face, these comments do nothing more than recite facts presented at trial and suggest a reasonable inference from those facts. The victim herself affirmed at trial that she loves defendant and did not wish that he be incarcerated for what he had done to her. Thus, the prosecution did not base an inference of credibility from any special knowledge about the victim to which the jury was not privy. *Bahoda, supra* at 276. Rather, the prosecution was attempting to convince the jury that because the victim still loved defendant, she possessed no motive to fabricate her accusations of abuse by him. Based on this, the prosecution argued that the jury should infer that the victim was truthful. Because this inference was reasonable and based on testimony presented at trial, the challenged remarks were not improper. *Thomas, supra*.

Defendant next argues that the trial court erred in allowing the victim's mother to testify regarding the victim's remarks to her about defendant's sexual misconduct. Again, we disagree. Because defendant failed to object to this testimony at trial, our review is again for plain error affecting defendant's substantial rights, i.e., error that was outcome-determinative. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003); *Carines, supra*.

MRE 803A, which codified the "tender years exception" to the hearsay rule, provides that a hearsay statement describing a sexual act performed with or on the declarant by the defendant may be admitted to corroborate the declarant's testimony at the same proceeding if, among other things, the statement was made by the declarant "immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance."

MRE 803A(3). Defendant challenges the admissibility of the testimony of the victim's mother on two grounds: (1) the length of time between the occurrence of the incidents and their subsequent report to the victim's mother, and (2) the fact that the victim did not actually fear defendant. However, we find neither ground sufficient to preclude admission of the subject testimony.

Initially, we note that the evidence at trial indicates that no more than three months passed between the abuse of the victim by defendant and her revelation of that abuse to her mother. We additionally note that while fear of the perpetrator is a valid basis for excusing a delay in the report of sexual abuse, see *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996), it is not the sole basis for excusing such delay. MRE 803A(3) itself refers only to "fear," without regard to its cause. The rule also excuses a delay for any other "equally effective circumstance." See, e.g., *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995) (wherein this Court indicated that fear, as contemplated in MRE 803A(3), is not limited to fear of defendant, but may also include fear of reprisals against the perpetrator). Here, the child victim testified that she failed to immediately disclose the abuse by defendant, who is her father's cousin, for fear that such disclosure would cause a rift in her family and ultimately result in defendant, whom she continued to love despite the abuse, going to jail. In light of this testimony, a delay that could not have been longer than three months is sufficient to render the victim's mother's testimony both reliable and admissible under MRE 803A. *Dunham, supra*; *Hammons, supra*. Accordingly, we find no plain error in the admission of the challenged testimony at trial.<sup>1</sup>

Finally, defendant argues that the evidence was insufficient to support his convictions. We review sufficiency of the evidence claims de novo to determine whether the evidence, viewed in a light most favorable to the prosecution would warrant a reasonable juror in finding that all the elements of the charged crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). In doing so, however, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

To establish first- and second-degree criminal sexual conduct as charged against defendant, the prosecution was required to produce evidence showing sexual penetration and contact by defendant of a person under 13 years of age. See MCL 750.520b(1)(a); see also MCL 750.520c(1)(a). "Sexual penetration" is defined, in relevant part, as "sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(o). "Sexual contact" is defined as "the intentional touching of the victim's or actor's intimate parts . . . if that intentional

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<sup>1</sup> In any event, even if the hearsay evidence had not been admissible, the error is not a ground for reversal unless it was outcome determinative. *Carines, supra*. This standard has not been met because the evidence was cumulative of the victim's trial testimony, which, as explained below, was itself sufficient to support defendant's convictions. See MCL 750.520h; see also *People v Meerboer*, 181 Mich App 365, 373-374; 449 NW2d 124 (1989).

touching can reasonably be construed as being for the purpose of sexual arousal or gratification . . .” MCL 750.520a(n).

Defendant does not dispute that the testimony at trial established that the victim was under thirteen years of age at the time of the charged offenses. Regarding the remaining elements of the charged crimes, the victim indicated that on two occasions defendant put his finger “inside” her “private,” and that it “hurt” when defendant did so, while simultaneously squeezing her buttocks. If believed, *Wolfe, supra*, this testimony when viewed in a light most favorable to the prosecution was alone sufficient to establish that defendant sexually penetrated the victim. MCL 750.520a(o); see also MCL 750.520h (“[t]he testimony of a victim need not be corroborated in prosecutions under section 520b to 520g”).<sup>2</sup> Further, because defendant’s squeezing of the victim’s buttocks occurred while he was digitally penetrating her, it is reasonable to construe that such contact was intentional and for the purpose of sexual “arousal or gratification.” MCL 750.520a(n). Contrary to defendant’s assertion, that a subsequent physical examination of the victim did not reveal any physical injuries does not render the evidence in support of his convictions insufficient. In fact, the physician who examined the victim noted that it is uncommon to see physical evidence of digital penetration and noted that she could not rule out that a sexual penetration had in fact occurred. Because when viewed in a light most favorable to the prosecution a rational jury could conclude that the evidence proved the elements of first- and second-degree criminal sexual conduct beyond a reasonable doubt, the evidence at trial was sufficient to support defendant’s convictions. *Nowack, supra*.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray

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<sup>2</sup> Although not necessary to support defendant’s conviction, MCL 750.520h, we note that the testimony of both the victim’s mother and Dr. Nutan Saxena corroborated the victim’s claims. Specifically, the victim told the victim’s mother that defendant had put his finger inside her. Also, as part of her sexual assault medical examination, the victim told Saxena that defendant put his finger inside her “private” and “pumped” several times.